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THE POLICE POWER VERSUS PROPERTY RIGHTS.

IS CONTEMPORANEOUS constitutional interpretation more and more reflecting alien views of government, because American conditions are becoming more similar; because some State legislators think so; because there is a growing disrespect for civil liberty and property rights; or, is it that this generation is converting the glorious self-dependence of the Fathers into a degenerate paternalism of the sons and is inclined to lean upon, instead of supporting the government? Indeed, is the provincial spirit of personal independence decaying in America and the police power becoming paramount? It may serve a useful purpose to reflect a moment upon these unwelcome theories, as deplorable as is their hostility to the original American idea of government.

A contrast of Colonial contemporaneous views of the functions of government, with respect to liberty and property, satisfactorily evidences a wide going aside from the standard fixed by the Founders. The paternal tendency of a growing number of statutes, one may respectfully observe, is due in large measure to a present liberality of the courts in upholding them. It is intended to serve a warning in observing that the expediency of this class of State legislation, if encouraged, may easily become master over principle, under the laudable desire of the courts not to interfere with State legislation, or under the influence operating upon legislators growing out of normal hardships or inconveniences that are temporarily embarrassing some groups of unhappy people. It is to be regretted that the Federal Supreme Court recently felt obliged to sustain a very unfortunate Wyoming statute, as to which there arises a justified apprehension of encouragement to further paternal legislation.

In *Walls v. Midland Carbon Co.*,¹ the court held constitutional, under the police power, an act of the Legislature of Wyoming, which, said Justice McKenna, "prohibits, or to use its

¹ 41 Sup. Ct. 118, dec. Dec. 13, 1920.

words, declares it to be a 'wasteful and extravagant use of gas when it is burned or consumed without the heat therein contained being fully and actually applied and utilized for either manufacturing or domestic purposes.' But not even that unlimitedly, but only when the 'gas well or source of supply is located within ten miles of any incorporated town or *industrial plant*.' * * * There is a prohibition upon the owner or lessee * * * to sell or dispose of the gas, *except under the specified conditions*, 'for the purpose of manufacturing carbon or other resultant products.' " [Italics supplied.]²

The manifest object of the statute is to conserve gas for municipal lighting and heating or "for the use of industrial plants". It does not bring into question in a proper case the general right of eminent domain, to believe that the "regulation" in the instant case is an obvious taking of private property for both public and *private use*. There is created such a limitation upon the owner's right to the control and distribution of his product as will substantially reduce its normal market value. Nor can a distinction as to natural resources arise, so long as the American legal policy obtains that permits the fee simple to carry with it all minerals, oil, gas and other natural products on or under the soil. That being the law, its concomitant is the right of complete dominion over and benefit from natural resources, as complete as over farm products raised on the land or trees cut therefrom. Therefore, it is respectfully argued that there is no legal or political right of deprivation residing in the government save by the accepted and approved processes of law, unless health or morals be involved. Surely it will not be contended that the taking of private property for private use or benefit is justified under any circumstances, although it is the avowed purpose of the legislation in question to present to private owners of "industries" that which was taken from private owners of gas wells.

Now, conceding the indefensibleness of waste, however it occurs, ought not that human frailty to be cured by education or by direct visitation upon the offending individual, and not by

² At p. 121.

a special confiscation of property rights within a prescribed territory? If the answer be in the negative, then there should be a frank nationalization of the natural resource in which the objectionable practice prevails. It is earnestly but respectfully asserted that the effect of the statute *is in its nature a money penalty levied without a trial!* Frank dealing demands that a revered principle assuring civil liberty and property rights, if no longer acceptable to the people, should be destroyed and decently interred, and not kept alive in an emasculated form, as a living deception lulling an untrained laity to its doom.

In support of this thought, one feels obliged to burrow beneath the surface of this legislation and observe the intent, for here it will be found. As a concrete fact, did the State of Wyoming, by means of its statute, essay an attempt at character building, or general conservation, or was it not actually making provision for the winter fuel and nightly light of certain municipalities and "industries"? The opinion of Mr. Justice McKenna answers the latter question very satisfactorily in the affirmative, for it is pointed out that the statute applied "only when the gas well or source of supply is located within ten miles of any incorporated town or *industrial plant*." In consequence, the unfortunate people residing over ten miles from a city or an industrial plant are left to their "wicked" ways and all the balance of the natural gas in the great State of Wyoming is still going to waste. Since the property of one group of many has been taken for the use of another without compensation or due course of law, in order to maintain faith in the proper intentions of the legislators, one feels obliged to reject the conservation, the moral and the ethical view, and to conclude that there has been no offense against the maxim "*sic utere tuo ut alienum non laedas*", but that certain cities and industries in Wyoming, suffering from an overweening frugality, wished to conserve a cheap fuel and light supply without undergoing the expense of acquiring the source of that supply.

So one might be pardoned for objecting to the statute because, (1) the government attempted to create statutory ethics, or (2) because it took private property without just compensa-

tion and due process of law, or (3) because it nationalized an industry, or (4) because the nationalization was confined to a given territory and a limited number of citizens, or (5) because the statute was not uniform in its operation and thereby violated the basic democratic principle of equal opportunity, or (6) because private property was taken by the government for private use.

The right of the police power is conceded to government for public and *quasi*-public purposes, and may be accompanied by an incidental personal financial loss in many cases. So, also, must there be conceded the peculiar and exclusive province of government to guarantee property rights, the corollary to which proposition is the enjoyment incidental thereto associated with ownership. No legal principle rests upon a firmer basis of decisions. Security of property rights implies that the government must take only by accepted processes, for otherwise it would itself become a robber against whom no police power could successfully contend. Might and not right would inevitably become the measure of property rights. Therefore, if excuse be found for the doctrine expounded by the Wisconsin legislature, one is obliged to seek abroad, where the will of the Prince is the law of the land and property rights depend upon the grace of the Monarch. We are therefore obliged to depart from the constitutional standards of the Fathers and view the enterprise in a foreign light, albeit one is unable to find conditions in America that demand this poisonous exotic for a cure.

If the government chooses to alter its form, spirit and genius, there may indeed be nationalized not only natural resources but all other property and industry and, in fact, every human endeavor. There are examples. Russia has done it. However, the orthodox do not merely criticize Lenine and Trotsky, but condemn and abhor them as the enemies of civilization, mankind and organized government. With a sacred principle of government at stake, it is idle to draw a distinction between partial and entire nationalization, except to admire the frankness of Lenine, if that be possible.

It will now be understood that we are pleading for the life of a principle, that fundamental principle of democracy adminis-

tered under a republican form of government, or else for its destruction and its decent interment. There is no middle ground. It is not the probability that human endeavors and natural resources will be wholly nationalized in America during this generation, that one fears. Paralysis, though eventually sudden in effect, is not the work of a day nor is it always recognizable by first symptoms while its deadly work is going on. Is it necessary to remark that allowing the lesser evil in government assures the exercise of the greater in due time? Once the bars are let down to socialism or communism by the slightest departure from the government of the Fathers, the enemies of the American social system and theory of organized government will gather around them a horde who will successfully fling themselves upon its very vitals, and there will result a Russianized America. The words of the court give assurance that one has not gone astray, in an inspired meditation, in criticizing the Wisconsin statute, for, says the learned Justice, "The question in the case is, as we have said, whether the legislation of Wyoming is a valid exercise of the police power of the State, and brings into comparison the limits of the power as against the asserted rights of property."

There is another effect springing from the enforcement of this statute that deserves emphasizing, for aspiration to good citizenship is weakened. When an individual stands sponsor for a commitment, and fails in his responsibility, he is accounted as lacking in essential qualities. The announced policy of the government that the fee simple carries with it all property from the sky above to the depths beneath calls for an administration that protects those rights. The enactment of regulations equivalent to ownership, of ununiform application and measured by geographic influences, creates a farce of ownership most regrettable. According to the statute an owner over ten miles distant is unhampered while his neighbor, say but a few feet away, has a restricted if not a prescribed market. This is a discrimination and a destruction of equal opportunity. Owners burdened with this handicap manifestly view with resentment such an administration of the law, and in seeking relief therefrom or a uniform participation therein may attempt to retrieve their

losses and in doing so harken to the lure of a like expediency, and thus an entire Nation may be led from the road laid out by the Founders of government and, in the course of time, true Americanism be wholly destroyed.

But do contemporaneous conditions justify the manner of relief sought and obtained by certain citizens of the State of Wyoming, for whose private benefit this legislation was intended? Let us hope not, although the conservation of natural gas be important, if not imperative. Men of to-day are succumbing to the habit of using the government to obtain their desires, by appropriations, either direct or extracted from other individuals through the instrumentalities of government, when that proves more prompt and expedient. This is the spirit animating most of the extraordinary applications of the police power of to-day by State legislatures, and the thought leads one to philosophizing.

The policy of the Fathers was that "the best governed people were the least governed people". Citizens were left to work out their own problems, and they were generally possessed of or developed the manhood to do it. Men were assured freedom "in the enjoyment of life and liberty" and they were not to be deprived of them by statute or private agreement. So were they assured of "the means of *acquiring and possessing property* and pursuing and obtaining happiness and *safety*".³ It is also set down: "That no man or set of men * * * is entitled to exclusive or separate * * * privileges from the community * * *."⁴ Now equality of man is a noble theory, but equality of opportunity is an essential condition and is the essence of democracy. One hardly expects to hear a voice declaring that there are industrial, social, natural or governmental conditions that justify violation of the sacred principles set forth in the Virginia Bill of Rights, for in such an event we will have indeed gone far afield.

There is nothing that has worked more injury to manhood or that men so resent as the granting of special privileges, unless it be the deprivation of one's personal rights. It is most re-

³ Va. Bill of Rights, § 1.

⁴ *Ibid.*, § 4.

spectfully submitted that the Wisconsin legislation offends in both aspects. That one mourns the suppression of the spirit of the Bill of Rights causes him to grieve no less over the expediency of a partial deprivation of property rights in the name of the police power, without due process of law and just compensation. It is repeated that if there is to be a nationalization of natural resources by degrees, let the fact be announced as a governmental policy in simple fairness to a deluded people, and let there cease the ultimate accomplishment of it through the gradual diminution of the rights and privileges incident to these resources and that give them value. The distinguishing feature of the American government is the supposed security and freedom from police oppression afforded to civil liberty and property rights.

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